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CASE NO. 84-658

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER 1984 TERM

Lewis W. Shurtleff, Inc., and
Frontier Properties, Inc.,
Debtors,
Thomas D. Elliott, etc., et al.,
Appellees,
vs.
Frontier Properties LP 123, etc., et al.,
Appellants.

Frontier Properties LP 101, etc., et al.,
Appellants,
vs.
Lewis Warren Shurtleff, et al.,
Appellees.

Standing Committee On Discipline, etc.,
Appellees,
vs.
John M. Ross,
Appellant.

On Appeal From The United States
Court of Appeal For The Ninth Circuit

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

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In Pro Per

15 pp

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES CITED	i
INTRODUCTION	1
FACTS	1
ARGUMENT	2
THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THIS COURT'S JURISDICTION AND IT IS NOT TAKEN IN CONFORMITY WITH STATUTE	4
THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED BECAUSE THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO MERIT FURTHER ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES CITED

	PAGE
Koden v. U.S. Dept. of Justice 564 F.2d 228, 233 (7th Cir. 1977)	10
Levenson v. Mills 294 F.2d 397, 398 (1st Cir. 1961)	10
Thys Company v. Anglo California National Bank, 219 F.2d 131 (9th Cir. 1955)	8
RULES	
U.S. Sup. Ct. Rules, Rule 16.1(a)	1, 4
U.S. Sup. Ct. Rules, Rule 16.1(c)	1, 5
U.S. Ct. App. 9th Cir., Rule 19(b)	8
Fed. Rules App. Pro., Rule 31(c)	8
Fed. Rules App. Pro., Rule 46(c)	9

INTRODUCTION

Appellee Donald Merkin, pursuant to Rules 16.1(a) and (c) of the Rules of the Supreme Court of the United States, hereby moves the Court to dismiss the appeal herein, on the grounds that 1) The appeal is beyond this Court's jurisdiction, 2) The appeal is not taken in conformity with statute. Alternatively, appellee moves the Court to affirm the judgment and order appealed from, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

FACTS

As set forth in appellants' jurisdictional statement, this appeal is taken from an order and a separate judgment entered by the United States Court of Appeals for the Ninth Circuit. The order was entered on July 14, 1984, and is set

forth in the Appendix to appellants' jurisdictional statement at page 51. In that order, the Court of Appeals dismissed three appeals (nos. 83-6104, 83-6105 and 83-6148) because of appellant's failure to comply with the rules and orders of that court (referred to herein as the "order").

The judgment appealed from, entered by the Court of Appeals on June 25, 1984, is reported at 735 F.2d 1168, and is set forth in the Appendix to appellants' jurisdictional statement at page 84. That judgment, or appeal no. 83-6160, affirmed an order of the District Court for the Southern District of California suspending appellants' counsel from practice before it (referred to herein as the "judgment").

ARGUMENT

This appeal is wholly without merit. It is another attempt by these appellants, in a series of attempts, to delay and obfuscate these proceedings. By their

rather lengthy jurisdictional statement, appellants seem to be appealing on the "merits" of their case. But a closer look at the record reveals that the cases relating to the order were never brought before the Court of Appeals on their merits. Appellants failed to comply with the rules of that court and their appeal was dismissed. That is the order from which they now appeal.

The judgment from which appellants appeal is a judgment affirmed by the Court of Appeals disciplining appellant's attorney, John Ross, Esq. The record will bear out numerous instances of conduct by Mr. Ross which support the Court's judgment. The authority cited below clearly shows that this appeal should be dismissed.

I

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THIS COURT'S JURISDICTION, AND IT IS NOT TAKEN IN CONFORMITY WITH STATUTE

Rule 16.1(a) of the Rules of this Court provides that a motion to dismiss an appeal can be made on the ground that the appeal is not within the Supreme Court's jurisdiction, or because the appeal is not taken in conformity with statute. Such grounds exist here.

The proper cases for review of the decisions of the Court of Appeals are set forth in 28 U.S.C. Section 1254, which provides in part:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
>
> 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:
> 2) By appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the

Constitution, treaties or laws of the United States..."

As stated above, the appellants have appealed from an order and a judgment entered by the Court of Appeals (not by writ of certiorari). Neither the order nor the judgment held any state statute to be invalid. Thus, this appeal should be dismissed as beyond this Court's jurisdiction, and as not taken in conformity with statute.

II

THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED BECAUSE THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO MERIT FURTHER ARGUMENT

In the event the Court were to construe this appeal as a petition for a writ of certiorari, sufficient grounds for dismissal still exist:

Rule 16.1(c) of the Rules of this Court provides that a motion to dismiss can be made on the ground that it is manifest that the questions on which the decision of

the cause depends are so unsubstantial as not to need further argument.

In their jurisdictional statement herein, Appellants assert twelve issues to be decided on appeal. However, the first ten issues asserted, relate to the merits of Appellants' appeals below. Since the appeal herein is from the order and judgment described above, the issues in this appeal relate only to that order and judgment and not to the merits of the case. The issues properly are: (1) The propriety of the dismissal of appeals below for noncompliance with the lower court's rules and orders, and (2) the propriety of the lower court's affirmation of the disciplinary order of the District Court.

A. The Court of Appeals acted properly in dismissing the appeals before it for failure to comply with that court's rules and orders.

As discussed above, the appeal herein

is taken in part from an order of the Court of Appeals for the Ninth Circuit, dismissing three appeals for failure to comply with the rules and orders of the Court. In its order, the Court specified those failures as: (1) Failure to file the opening briefs, (2) late submission of briefs that did not conform with court rules, (3) repeated filing of untimely motions, and (4) misrepresentations to the Court regarding the prosecution of the appeals. In addition to dismissing the appeals, the Court of Appeals found those failures to be sufficient to justify the suspension of Appellants' counsel from practice before it.

In taking such action, the Court of Appeals relied on its own Rule 19(b), which provides:

> "When an appellant **fails** to file a timely record, pay the docket fee, file a timely brief or otherwise comply with rules requiring processing the appeal

> for hearing, **the Clerk will enter an order dismissing the appeal.** In the event of such a dismissal, the Court may also impose disciplinary and monetary sanctions on those responsible for prosecution of the appeal..." U.S. Ct. of App. 9th Cir. Rule 19(b) (Emphasis added).

Authority for that sanction may be found in the Rules of Appellate Procedure, Rule 31(c) of which provides in part:

> "If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal..."
> Fed. Rules App. Pro. 31(c)

The power to dismiss appeals has long been recognized in the Ninth Circuit, and affirmed by this Court:

> "Where...the brief for an appellant exhibits a gross disregard of the requirements of our rules, a dismissal of his appeal is warranted."
> Thys Company v. Anglo California National Bank
> 219 F.2d 131, (9th Cir. 1955), cert. denied 349 U.S. 946, rehearing denied 350 U.S. 855.

Rule 46(c) grants to the Courts of

Appeal the power to discipline attorneys who practice before them for failure to comply with any rule of the court. Fed. Rules App. Pro. 46(c).

Thus, the Court of Appeals had the power to dismiss the appeals for the grounds stated, and to discipline Appellants' counsel. The question of law is unsubstantial and the order should be affirmed.

B. The Court of Appeals acted properly in affirming the disciplinary order of the District Court.

In its judgment entered June 25, 1984, the Court of Appeals affirmed the order of the District Court suspending Appellants' counsel from practice before it. The Court of Appeals based its decision on the power of the District Court to discipline attorneys who practice before it.

> "It is elementary that any court...which has the power to admit attorneys to practice has

> the authority to disbar or discipline attorneys for unprofessional conduct."
>
> Koden v. U.S. Dept. of Justice 564 F.2d 228, 233 (7th Cir. 1977)

The District Court is required to exercise and regulate that power by sound and just judicial discretion but the findings of fact in support of such an order will not be overturned unless clearly erroneous. Levenson v. Mills 294 F.2d 397, 398 (1st Cir. 1961) cert. denied, 368 U.S. 954 (1962)

No showing was made below that the District Court's findings were clearly erroneous. The Court of Appeals acted properly and there is no need for further argument. The judgment below should be affirmed.

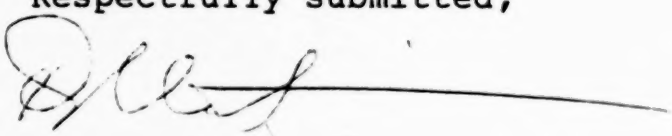
CONCLUSION

This appeal is not authorized by law and whether treated as a petition or writ of certiorari or not, it is manifest that

the questions raised are so unsubstantial that they need no further argument. Thus, for the foregoing reasons, this appeal should be dismissed, or alternatively, the judgment and order appealed from should be affirmed.

Dated: November 20, 1984

Respectfully submitted,



Donald Merkin